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Appellee's Brief 1975-SC-1004

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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 75-1004

PAUL E. PITTS

APPELLANT

VS.

JOE CRAWFORD; GEORGE R. WAGONER, ACTING
COMMISSIONER OF LABOR AND CUSTODIAN OF
THE SPECIAL FUND (SPECIAL FUND); AETNA
LIFE AND CASUALTY INSURANCE COMPANY; and
WORKMEN'S COMPENSATION BOARD ----- APPELLEES

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE SETH T. BOAZ, TRIAL JUDGE

BRIEF FOR APPELLEE,
GEORGE R. WAGONER (SPECIAL FUND)

KENNETH E. HOLLIS

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FILED

FEB 5 1976

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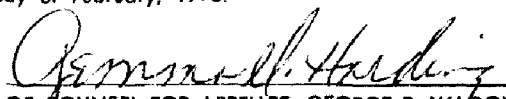
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SUPREME COURT

This is to certify that pursuant to R.C.A. 1.250 a true copy of this brief has been served on the Honorable Louis V. Mangrum, Mayfield, Kentucky 42066; Honorable Richard Weisenberger, 223-231 North Seventh Street, Mayfield, Kentucky 42066; Honorable William L. Huffman, Director of Workmen's Compensation Board, Capitol Plaza Office Tower, Frankfort, Kentucky 40601; and the Honorable Seth T. Boaz, Judge of Graves Circuit Court, Mayfield, Kentucky 42066, this the 5th day of February, 1976.


OF COUNSEL FOR APPELLEE, GEORGE R. WAGONER

4405

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**STATEMENT OF
QUESTION PRESENTED**

**WAS THERE EVIDENCE OF RECORD AS WELL AS
STATUTORY AND RULING CASE LAW TO SUSTAIN
THE DISMISSAL OF GEORGE R. WAGONER
(SPECIAL FUND) FROM ALL LIABILITY IN THIS
MATTER?**

George R. Wagoner (Special Fund) answers this
question affirmatively.

SUPREME COURT OF KENTUCKY

File No. 75-1004

PAUL E. PITTS -----APPELLANT

VS.

JOE CRAWFORD; GEORGE R. WAGONER, ACTING
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APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE SETH T. BOAZ, TRIAL JUDGE

BRIEF FOR APPELLEE,
GEORGE R. WAGONER (SPECIAL FUND)

MAY IT PLEASE THE COURT:

Unless otherwise apparent or indicated throughout this brief, numbers in parenthesis standing alone refer to pages in the original record of the Workmen's Compensation Board of Kentucky. The appellant, Paul E. Pitts, is usually referred to as "claimant." The appellee, Kentucky Workmen's Compensation Board, is usually referred to as "Board." The employer and his insurance carrier, Joe Crawford and Aetna Life and Casualty Insurance Company, are usually referred to as "employer." George R. Wagoner (Special Fund), is usually referred to as "Special Fund" or simply "Fund." T.R. refers to the Transcript of Record of the Graves Circuit Court.

COUNTER STATEMENT OF THE CASE

Mr. Paul Pitts filed an application for adjustment of claim on January 22, 1974 alleging that he injured his back while at work on November 27, 1972 (1). Previous to this November 27, 1972 injury, the claimant had received a 25% permanent partial disability award for an alleged back injury that occurred in February, 1972, and for which he was operated (139).

Several doctors examined claimant and the consensus was that claimant suffered from a pseudospondylolisthesis and degenerative disc condition. In their Opinion and Award dated November 4, 1974 (270) the Board dismissed the Special Fund from all liability on the grounds these conditions were not disease conditions for which the Fund had liability under the provisions of KRS 342.120 as effective at that time. The claimant then appealed to the Circuit Court and on August 27, 1975 the Graves Circuit Court affirmed the Board's findings of fact (T.R. 47). From this final judgment the claimant now prosecutes this appeal to this Court.

ARGUMENT

THERE WAS EVIDENCE OF RECORD AS WELL AS STATUTORY AND RULING CASE LAW TO SUSTAIN THE DISMISSAL OF THE SPECIAL FUND FROM ALL LIABILITY IN THIS MATTER.

The Workmen's Compensation Board in the findings of fact of their Opinion and Award dated November 4, 1974 (270) stated very specifically in dismissing the Special Fund that:

1. As stipulated.
2. That plaintiff suffered a 25% active disability prior to the compensable injury of November 27, 1972.
3. That plaintiff is 40% permanently partially disabled as a result of a combination of 25% active disability and the compensable injury of November 27, 1972 from an occupational standpoint.
4. Plaintiff did not have a pre-existing dormant diseased condition that was aroused to disabling reality, nor did the plaintiff's active 25% disability, and the subsequent disability caused by the injury of Nov. 27, 1972, cause a greater disability than by simple addition; hence the compensable injury of Nov. 27, 1972, is contributing a 15% of plaintiff's 40% occupational disability.
5. That plaintiff was temporarily totally disabled from Nov. 27, 1972 to December 27, 1973.

Again, in explaining specifically as to how the Board arrived at their findings of fact, the Board very succinctly and clearly explained their interpretation of the evidence (271-272):

The record includes the testimony of at least three physicians plus the report of a doctor to whom the Board referred the plaintiff by reason of the Special Fund having been made a party. The attorneys in this action through their examination of the testifying physicians have created confusion rather than clarification as to what disability the plaintiff suffers or has suffered by reason of the Nov. 27th, 1972 incident.

The plaintiff had had a prior injury to his back on March 1, 1972. At that time he had had a disc injury which resulted in some surgery. According to his admission and as indicated in the record, the plaintiff had made a settlement as to his March, 1972 injury on the basis of a 25% permanent partial disability. While neither the plaintiff nor the defendant have mentioned it, it seems quite obvious to us that by reason of this settlement, the plaintiff had a 25% active disability at the time of the injury on Nov. 27, 1972 which is the subject of the present claim. Estimates of plaintiff's present disability, functional and/or occupational run the range from 30% to 70%. Estimates of plaintiff's disability directly resulting from his Nov. 27, 1972 accident run from 15 to 20%. The evidence as to whether or not plaintiff's traumatic incident of Nov. 27, 1972 resulted in the arousal of any dormant nondisabling diseased condition into a disabling reality is in conflict. The diseased condition referred to by Dr. Ainsworth, who examined the plaintiff at the Board's direction does not constitute a diseased condition under the law as interpreted by our Court. The only disease referred to in the record which might qualify on this point was "osteomalacia". The most that this could have contributed according to any evidence was 5% and there is evidence of substance in the record on which a finding could be made that this "so-called" disease was not a factor in plaintiff's present disability, and we so find.

This was fully substantiated by all the medical evi-

dence of record. Dr. Sexton, a neurosurgeon, who saw the claimant on December 27, 1973 (after both alleged injuries had occurred), stated in his deposition (23) that Mr. Pitts suffered a residual disability at the time of his injury on November 27, 1972 of probably no less than 15% and probably no greater than 20% to the body as a whole. Later in the same deposition (24) he said that if he saw the claimant the day of the deposition he would state his bodily functional disability to be no more than 40% to the body as a whole.

Dr. Sam Hunter, also a neurosurgeon, testified (99) that he expected Mr. Pitts to recover to a point of having 35% permanent partial disability as a result of both operations (99). Dr. Hunter attributed an overall functional disability of 35%, 15% to the March, 1972 injury (for which he received an award of 25%) and 20% to the second injury of November, 1972 (105). There was no excess of disability over and above the disability for the two injuries.

Dr. Lester Reed, another neurosurgeon, found claimant to be 30% to 40% permanently partially disabled. He said this was an anatomical rating of which half was due to the March, 1972 injury and half to the November, 1972 injury (194). He also found no excess of disability.

Dr. George Ainsworth, the Board appointed doctor pursuant to KRS 342.121, found claimant to be suffering from pseudospondylolisthesis and a degenerative disc condition (221-223). He erroneously alluded to these conditions as diseases. See *Young v. Kentland Elkhorn*, Ky., 473 SW 2d 119 where it says:

. . . "One of the physicians described the condition in alternative terms; 'disorder or disease'; another physician merely characterized the condition as 'disease'; this does not necessarily raise the condition to the category. See *Young v. Long*, Ky. 453 SW 2d 326 (1971); *Ashland Crafts, Inc. v. Young*, Ky., 451 SW 2d 607 (1970); . . .

. . . while we cannot practice medicine, physicians and employers cannot unilaterally interpret statutes. . ."

This Court, in a long series of cases has ruled that these conditions are simply not "disease conditions" for which the Fund has liability. See *Young v. East Coal*, Ky., 468 SW 2d 316:

"Spondylolisthesis is not in itself a disease condition under our decisions"

Boone Box Co. v. Phillips, Ky., 474 SW 2d 86:

"All medical examiners diagnosed Phillip's condition as spondylolisthesis. The Board properly ruled in accordance with our prior decisions that spondylolisthesis is not a disease within the meaning of KRS 342.120. . ."

Young v. City Bus, Ky., 450 SW 2d 510 states:

"We are of the opinion that a dormant, non-disabling pre-existing degenerative disc in itself is not a disease condition for which the Special Fund is liable under KRS 342.120."

and *Appalachian Regional Hospital v. Brown*, Ky., 463 SW 2d 323:

In the instant case, both under the doctors understanding of common usage, as evidenced by their testimony, and under our own knowledge of common usage, the condition of having spondylolisthesis is not a "disease condition." Therefore, the Board properly determined there was no basis for apportionment.

The medical evidence, *supra*, was conclusive that all the disability was attributable to the two accidents alone, and that there was no additional disability over and above that caused by the two separate accidents. See *Young v. Campbell*, Ky., 459 SW 2d 781 (1970).

The Opinion and Award of the Board of November 4, 1974 (270), therefore, was fully substantiated by the evidence of record and in accordance with the statutory and ruling case law in this jurisdiction. Pursuant to this Court's ruling in *Armco Steel Corporation v. Mullins*, Ky., 501 SW 2d 261, the Graves Circuit Court committed no error of law when it affirmed the Board's findings:

"The Board is the sole fact finder in compensation proceedings and the circuit court may not substitute its opinion for that of the Board on the weight of the evidence. Factual findings by the Board, based upon substantial evidence, are conclusive and binding on the court. *E. I. Dupont DeNemours & Company v. Burns*, Ky., 427 SW 2d 581 (1968).

CONCLUSION

The Opinion and Award of the Board of November 4, 1974 and the Judgment of the Graves Circuit Court dated August 27, 1975 should both be affirmed in their entirety, specifically that portion of the award that dismissed the Special Fund from all liability.

Respectfully submitted,

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